

07-3547-cv
In re Pfizer Inc.

SDNY (NYNY)
04. cv. 10075
Owen

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

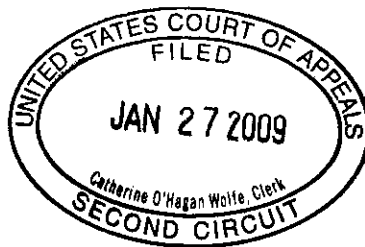
4 RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED
5 AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND
6 FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT
7 CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION
8 MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)."
9 UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE
10 WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT HTTP://WWW.CA2.USCOURTS.GOV), THE
11 PARTY CITING THE SUMMARY ORDER MUST FILE AND SERVE A COPY OF THAT SUMMARY ORDER TOGETHER
12 WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED. IF NO COPY IS SERVED BY REASON OF THE
13 AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT
14 DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

15 At a stated term of the United States Court of Appeals for the
16 Second Circuit, held at the Daniel Patrick Moynihan United States
17 Courthouse, 500 Pearl Street, in the City of New York, on the
18 27th day of January, two thousand nine.

19 PRESENT:

20 HON. ROBERT D. SACK,
21 HON. SONIA SOTOMAYOR,
22 HON. ROBERT A. KATZMANN,

23 Circuit Judges.



24 -----
25 IN RE: PFIZER, INC. DERIVATIVE
26 SECURITIES LITIGATION

27 MARVIN FREEMAN, SANFORD FLINKER,
28 SYLVIA G. FLINKER, JAMES BAKER and
29 MARILYN CLARK,

30 Plaintiffs-Appellants,

31 - v -

32 HENRY A. MCKINNEL, WILLIAM C. STEERE
33 JR., JEAN-PAUL VALLES, MICHAEL S.
34 BROWN, STANLEY O. IKENBERRY,
35 FRANKLIN D. RAINES, M. ANTHONY
36 BURNS, ROBERT N. BURT, W. DON

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No. 07-3547-cv

CORNWELL, WILLIAM H. GRAY, CONSTANCE
J. HORNER, WILLIAM R. HOWELL, GEORGE
A. LORCH, DANA G. MEAD, RUTH J.
SIMMONS, CONSTANTINE L. CLEMENTE,
PETER B. CORR, GEORGE P. HARVEY,
HARRY P. KAMEN, KAREN KATEN, JEFFREY
B. KINDLER, THOMAS G. LABRECQUE,
ALEX J. MANDL, DAVID SHEDLARZ,
MICHAEL I. SOVERN, and JOHN F.
NIBLACK,

Defendants-Appellees,

PFIZER INC., a Delaware Corporation,

Nominal-Defendant-Appellee.

Appearing for Appellants: Evan J. Smith, Brodsky & Smith,
LLC, Mineola, NY.

Appearing for Appellees: Gregory A. Markel (Jason M. Halper,
Ryan J. Andreoli, of counsel),
Cadwalader, Wickersham & Taft LLP,
New York, NY.

Appeal from a judgment of the United States District Court
for the Southern District of New York (Richard Owen, Judge).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED and
DECREED that the judgment of the district court be, and it hereby
is, AFFIRMED.

Lead plaintiffs Marvin Freeman, Sanford Flinker,¹ and Sylvia
Flinker, who represent the plaintiff shareholders in related
derivative suits against Pfizer, Inc. that were consolidated by
the Panel for Multi-District litigation, appeal from a judgment
against them based on an order of the United States District

¹ At oral argument, counsel for plaintiffs informed the
Court that Mr. Flinker had passed away and that his shares in
Pfizer had been transferred to Sylvia Flinker. Because Mr.
Flinker continues to be listed in the official caption to the
case, and no motion has been made to substitute his estate or a
personal representative as a party, we continue to list him among
the plaintiffs. See Local Rule 43(a)(1).

1 Court for the Southern District of New York granting the
 2 defendants' motion to dismiss this action. We assume the
 3 parties' familiarity with the facts and procedural history of
 4 this case, and the issues presented on this appeal.

5 The plaintiffs allege that the defendants, former directors
 6 and officers of Pfizer, were, or should have been, aware of
 7 significant cardiovascular risks associated with two of Pfizer's
 8 highly successful Cox-2 inhibitor arthritis drugs, "Celebrex" and
 9 "Bextra," and that they nonetheless permitted Pfizer to continue
 10 to market and sell these drugs aggressively, ultimately leading
 11 to hundreds of product liability or consumer fraud lawsuits and
 12 causing significant losses to Pfizer's market capitalization.
 13 The plaintiffs filed a shareholder derivative suit against the
 14 defendants, proffering several theories of liability including
 15 breach of fiduciary duty, gross mismanagement, and waste of
 16 corporate assets. The district court dismissed the complaint
 17 pursuant to Federal Rule of Civil Procedure 23.1 on the ground
 18 that the plaintiffs had failed to make a demand on the Board of
 19 Directors of Pfizer (the "Board") to initiate suit on behalf of
 20 the company, and had not pled facts sufficient to establish that
 21 such demand would be futile.

22 Rule 23.1(b) provides: "The complaint must . . . state with
 23 particularity . . . any effort by the plaintiff to obtain the
 24 desired action from the directors or comparable authority,
 25 and . . . the reasons for not obtaining the action or not making
 26 the effort." Fed. R. Civ. P. 23.1. The parties agree that since
 27 Pfizer is incorporated in Delaware, whether the demand
 28 requirement has been met is a question of Delaware law.
 29 See Scalisi v. Fund Asset Mgmt., L.P., 380 F.3d 133, 138 (2d Cir.
 30 2004).

31 We conclude that the alleged bases for demand futility are
 32 not sufficient to establish that there was a reasonable doubt
 33 that a majority of the Board "could have properly exercised its
 34 independent and disinterested business judgment in responding to
 35 a demand" at the time the complaint was filed allowing demand to
 36 be excused. Rales v. Blasband, 634 A.2d 927, 934 (Del. 1993).
 37 We therefore affirm the judgment of the district court.

38 Plaintiffs' Allegations

39 In order to successfully plead demand futility, the
 40 plaintiffs must plead facts that, if proved, would demonstrate
 41 that a majority of board members, eight directors in this
 42 instance, were either not disinterested or lacked independence.
 43 The defendants concede that two defendants, McKinnell and Steere,
 44 are not disinterested. The plaintiffs must therefore

1 successfully plead demand futility with regard to six other
 2 defendants in order to maintain this action. The plaintiffs have
 3 failed to do so.

4 "[T]he mere threat of personal liability . . . is
 5 insufficient to challenge either the independence or
 6 disinterestedness of directors and . . . a reasonable doubt that
 7 a majority of directors is incapable of considering demand should
 8 only be found where a substantial likelihood of personal
 9 liability exists." Wood v. Baum, 953 A.2d 136, 141 n.11 (Del.
 10 2008) (alteration in original) (internal quotation marks
 11 omitted). Where, as here, the defendant directors are
 12 contractually "exculpated from liability for certain conduct,
 13 then a serious threat of liability may only be found to exist if
 14 the plaintiff pleads a non-exculpated claim." Id. at 141
 15 (internal quotation marks and emphasis omitted).

16 Pfizer's shareholders, pursuant to Del. Code. Ann. Tit. 8, §
 17 102(b)(7) (2006), limited the directors' liability to the full
 18 extent permitted by Delaware Law. "Such a provision can
 19 exculpate directors from monetary liability for a breach of the
 20 duty of care, but not for conduct that is not in good faith or a
 21 breach of the duty of loyalty." Stone ex Rel. AmSouth
 22 Bancorporation v. Ritter, 911 A.2d 362, 367 (Del. 2006). This
 23 sets a higher threshold for the plaintiffs, because pleading a
 24 substantial likelihood of personal liability for a breach of good
 25 faith or the duty of loyalty requires the plaintiffs to allege
 26 different, and more culpable, conduct than necessary for a breach
 27 of the duty of due care. Id. at 369. We conclude that the
 28 plaintiffs allegations, do not meet that higher threshold.

29 Presumption of Knowledge by the Defendants of the
 30 Results of Certain Studies

31 The plaintiffs' allegations relating to personal liability
 32 each revolve around an asserted presumption that the defendant
 33 directors had knowledge of the drugs' cardiovascular risks. The
 34 plaintiffs point to several sources where this knowledge would
 35 have come from. They cite a 1999 Pfizer internal clinical study
 36 on elderly Alzheimer's patients that allegedly suggested
 37 heightened cardiovascular risks of Celebrex, and several
 38 published studies raising questions as to risks raised by Cox-2
 39 inhibitors and calling for their assessment by drug companies.
 40 The plaintiffs also refer to lawsuits brought between 2001 and
 41 2005 relating to the cardiovascular risks of Celebrex and Bextra.
 42 The plaintiffs would have the Court conclude on the basis of the
 43 defendant directors' presumed knowledge of these studies that the
 44 defendant directors were "interested" directors because they were
 45 therefore aware of their substantial exposure to the risk of

1 personal liability for a breach of their fiduciary duties. The
 2 plaintiffs argue that this knowledge should be presumed because
 3 it relates to a "core" activity of Pfizer, and courts have often
 4 presumed knowledge of information that relates to "core"
 5 activities of a corporation.

6 The plaintiffs have not cited any Delaware authority that
 7 would permit a court to infer from the existence of scientific
 8 studies within a corporation, without more, that the
 9 corporation's directors had knowledge of their existence and
 10 import. There is no legal basis for a conclusion here that,
 11 amidst the innumerable studies that Pfizer would likely have
 12 conducted on innumerable subjects, the existence of one that may
 13 have found cardiovascular risks related to Celebrex was
 14 necessarily known by all members of the Board simply because it
 15 existed and was related to Pfizer's "core" business. And without
 16 such an inference, the plaintiffs have alleged no facts that
 17 would lead to the conclusion that the defendants had such
 18 knowledge.

19 Nor have the plaintiffs established that defendants should
 20 be presumed to have known of published studies. In support of
 21 their proposition that knowledge of the studies should be
 22 presumed, the plaintiffs cite only one case that deals with
 23 demand futility under Delaware law, In re Biopure Corp.
 24 Derivative Litig., 424 F. Supp. 2d 305 (D. Mass. 2006). But the
 25 information of which the Biopure court presumed knowledge, an FDA
 26 clinical hold on a key drug for the company, was far more
 27 important, definitive, and central to the business prospects of
 28 the company than were the studies at issue here. Id. at 307-08.

29 The other cases that the plaintiffs cite for the proposition
 30 that we should presume the Board members' knowledge of the
 31 internal and published studies similarly refer to situations
 32 involving information of far greater magnitude than those at
 33 issue here. Moreover, they were not decided under Delaware law,
 34 and involved not demand futility inquiries, but circumstances
 35 giving rise to a strong inference of scienter in securities fraud
 36 claims. See, e.g., Cosmas v. Hassett, 886 F.2d 8, 13 (2d Cir.
 37 1989); Epstein v. Itron, Inc., 993 F. Supp. 1314, 1327 (E.D.
 38 Wash. 1998) abrogated on other grounds by In re Silicon Graphics
 39 Inc. Sec. Litig., 183 F.3d 970, 974 (9th Cir. 1999). We do not
 40 view this authority as persuasive here. Demand futility
 41 inquiries are different from inquiries as to scienter and fraud.
 42 For example, scienter is a question of knowledge; demand
 43 futility, at least in the present context, requires both a
 44 showing of knowledge and that the knowledge created an
 45 affirmative duty to act, which the directors consciously ignored.
 46 See Stone, 911 A.2d at 369.

1 Because of the differences between scienter and demand
 2 futility inquiries, the lack of Delaware case law supporting
 3 presuming such knowledge in demand futility inquiries, and the
 4 relative unimportance of the studies at issue here as compared
 5 with the importance of the information dealt with in the cited
 6 cases, we conclude that the plaintiffs' pleaded facts do not give
 7 rise to a presumption that defendant directors had knowledge of
 8 these studies. Even were we to presume such knowledge, however,
 9 plaintiffs have not adequately pleaded that such knowledge would
 10 have given rise to a duty to act that defendants would have
 11 necessarily been aware of and consciously disregarded, such that
 12 a breach of the duty of good faith would be established.

13 We conclude that the plaintiffs' claim that a majority of
 14 the Board was not disinterested due to a substantial likelihood
 15 of personal liability arising out of knowledge of scientific
 16 studies fails.

17 Members of the Audit Committee

18 The plaintiffs' allegations that members of the Audit
 19 Committee were not disinterested also are insufficient. Insofar
 20 as these assertions relate to the defendants' failure to monitor
 21 the financial books and records of the company, they would appear
 22 to be claims of breaches of the duty of care for which the
 23 defendants are not subject to personal liability under Delaware
 24 law and Pfizer's corporate charter. See Stone, 911 A.2d at 367.

25 Nor do the plaintiffs allege with particularity any
 26 accounting misstatements that would be a basis for a claim of
 27 securities fraud against the committee members. And in any
 28 event, the claims appear to be premised improperly on presumed
 29 knowledge of the cardiovascular risks, and failure to adjust the
 30 books accordingly.

31 The plaintiffs have failed in any event to plead that
 32 defendants knew that these studies in effect revealed incorrect
 33 or misleading financial statements and that the defendants,
 34 therefore, had a substantial likelihood of personal liability for
 35 securities fraud. As the Delaware Supreme Court has held,
 36 allegations of membership on an audit committee combined with
 37 conclusory allegations of financial misstatements by the company
 38 are not sufficient to plead demand futility. Wood, 953 A.2d 136.

39 Members of the Science and Technology Committee

40 We do not decide whether the members of the Science and
 41 Technology Committee are disinterested because the
 42 disqualification of the three of them would not be sufficient

1 basis for a finding that a majority of Board members was either
 2 interested or lacked independence such that demand would be
 3 futile.

4 Insider Trading

5 The plaintiffs' allegations regarding insider trading lack
 6 the requisite particularity, because the timing of the sales they
 7 cite does not support an inference of illegal insider trading.
 8 All of them, except for the sales by the defendants conceded to
 9 be interested and by defendant Vallès, which we discuss below,
 10 occurred in 2000 and 2001. The plaintiffs give no reason why
 11 their timing suggests trading on the basis of inside information.
 12 The only nonpublic information the plaintiffs point to is the
 13 1999 clinical study. There is no reason we can perceive upon
 14 which to conclude, on the facts pleaded by the plaintiffs, that
 15 these defendant directors had knowledge of this study. The
 16 plaintiffs have therefore failed to plead facts upon which a
 17 court could conclude that the timing of these defendants' sales
 18 of Pfizer stock were questionable, or that the directors would
 19 have been in possession of material nonpublic information trading
 20 upon which would have given rise to a viable insider trading
 21 claim rendering these defendants interested.

22 Defendant Vallès

23 Because an analysis of the insider trading allegations
 24 relating to defendant Vallès's securities trading is more
 25 complicated and does not affect the outcome of this appeal, we
 26 forgo it. We assume for the purposes of this decision that he
 27 was neither disinterested nor independent.

28 Longstanding Personal and Professional Ties

29 The plaintiffs also argue that longstanding personal and
 30 professional ties between Board members, including Vallès, show
 31 that these defendants lacked independence. It is well
 32 established under Delaware law that the number of years that
 33 defendants have served on a board or multiple boards together
 34 cannot suffice as a basis to successfully plead a lack of
 35 independence for demand futility purposes. See, e.g., In re Walt
 36 Disney Co. Deriv. Litig., 731 A.2d 342, 357 (Del. Ch. 1998),
 37 reversed on other grounds sub. nom, Brehm, 746 A.2d at 244; Beam
 38 ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart, 845
 39 A.2d 1040, 1049 (Del. 2004).

40 Denial of the Plaintiffs' Motion to File Amended Complaint

1 Following the district court's dismissal, the plaintiffs
 2 sought leave to amend their complaint. The district court asked
 3 the plaintiffs to provide the information with which they would
 4 amend their complaint, such that amending the complaint would not
 5 be futile. The plaintiffs stated that they would "further
 6 illustrate" the alleged suspicious trading activity relating to
 7 their insider trading allegations, and that they had new evidence
 8 from a related class action of actual accounting improprieties,
 9 which would relate to their claims regarding the Audit Committee
 10 members. The district court denied the plaintiffs' request for
 11 leave to amend.

12 We find no abuse of discretion in the district court's
 13 denial of leave to file an amended complaint, Bellikoff v. Eaton
 14 Vance Corp., 481 F.3d 110, 118 (2d Cir. 2007), because the
 15 proposed new allegations would be no more than variations on the
 16 allegations already adjudged to be inadequate by the court, and
 17 because more detailed accounts of financial improprieties would
 18 not save plaintiffs failure to plead interestedness on behalf of
 19 the Audit Committee members, thus making amendment futile. See
 20 City of New York v. Smokes-Spirits.Com, Inc., 541 F.3d 425, 452
 21 (2d Cir. 2008).

22 Conclusion

23 For the foregoing reasons, the judgment of the District
 24 Court is hereby AFFIRMED.

25 FOR THE COURT:

26 Catherine O'Hagan Wolfe, Clerk of the Court

27 By: Franklin Perry
 28